United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 20-0321**
	)	**Issued: April 26, 2021**
U.S. POSTAL SERVICE, RANCHO PARK POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 26, 2019 appellant, through counsel, filed a timely appeal from a September 24, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the September 24, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for authorization of total left knee replacement surgery.

FACTUAL HISTORY

On November 1, 1999 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 1999 she sustained cuts and bruises when she missed a step and fell while in the performance of duty. OWCP accepted her claim for right knee sprain, right ankle sprain, left tibia contusion, and bilateral wrist contusion. It subsequently expanded acceptance of her claim to include right knee contusion, left knee contusion, right chondromalacia, left knee meniscus tear. OWCP paid her wage-loss compensation on the periodic rolls, effective July 16, 2000. Appellant subsequently underwent right knee OWCP-authorized surgeries on August 3, 2000, February 28, 2002, August 12, 2004, and May 13, 2015, and left knee surgery on March 19, 2009. On April 2, 2015 OWCP expanded the acceptance of the claim to include temporary aggravation of right knee osteoarthritis. It paid appellant wage-loss compensation for intermittent periods of disability and returned her to the periodic rolls effective July 26, 2015.

Appellant continued to receive medical treatment. In an August 22, 2017 state workers' compensation progress report and letter, Dr. Guy D. Paiement, a Board-certified orthopedic surgeon, indicated that appellant had been under his care since September 13, 2016. He recounted appellant's current complaints of severe right hip osteoarthritis and left knee pain. Upon examination of appellant's left knee, Dr. Paiement observed tenderness to palpation in the medial compartment and no significant effusion. He diagnosed chronic left knee pain. Dr. Paiement reported that appellant had failed conservative management of her left knee and would likely be a good candidate for a left medial unicompartmental knee replacement.

On September 7, 2017 appellant returned to part-time, modified-duty work as a customer care agent.

In a September 21, 2017 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, recounted appellant's complaints of increasing bilateral knee pain. He noted bilateral knee examination findings of medial and joint line tenderness and limited range of motion (ROM). Dr. Herring diagnosed right knee patellar instability status post right knee patellar reconstruction surgery, right knee medial meniscus tear, status post right knee arthroscopy and meniscectomy, bilateral knee degenerative joint disease, and status post right total knee arthroplasty.

An October 4, 2017 left knee magnetic resonance imaging (MRI) scan revealed a tear of the posterior root of the medial meniscus with mild extrusion of the body of the medial meniscus and moderate tricompartmental chondrosis, most severe in the patellofemoral joint.

In an October 10, 2017 progress note, Dr. Paiement indicated that appellant was treated for continued right hip and bilateral knee pain. Upon examination of appellant's left knee, he observed tenderness to palpation in the medial, patellofemoral compartment and crepitus in the medial compartment. Dr. Paiement reviewed the left knee MRI scan report and diagnosed primary osteoarthritis involving multiple joints and right hip arthritis. He opined that appellant had

exhausted all conservative treatment modalities and recommended a total knee replacement because of the significant involvement of the medial and femoropatellar compartment.

On October 17, 2017 OWCP received a request for authorization for total left knee replacement surgery.

In a November 10, 2017 statement, appellant asserted that her left knee was swelling and painful, which caused major issues with standing, walking, and sitting. She reported that "both doctor and surgeon" had recommended that she undergo left knee replacement surgery. Appellant requested authorization for the proposed left knee surgery so that she could continue on with her life.

In reports dated November 16, 2017 through March 8, 2018, Dr. Herring indicated that appellant continued to complain of bilateral knee pain and was waiting authorization for total left knee replacement surgery. He provided examination findings and diagnosed right knee patellar instability, right knee medial meniscus tear, status post right knee arthroplasty, bilateral knee degenerative joint disease, and status post right total knee arthroplasty.

In a January 12, 2018 progress report, Dr. Paiement recounted that appellant's left knee had significantly worsened since returning to work. He discussed the conservative medical treatment that she had tried and noted that none of these treatments had provided significant relief. Dr. Paiement provided examination findings and diagnosed left knee severe osteoarthritis, status post right total knee arthroplasty, and right hip severe osteoarthritis. He opined that a left total knee arthroplasty was medically necessary to treat appellant's left knee condition.

On January 11, 2018 appellant stopped work.

In statements dated January 25 and March 28, 2018, appellant requested an update on her wage-loss compensation claim and request for total left knee replacement surgery. She asserted that her bilateral knee pain and swelling had increased since returning to work.

In an April 10, 2018 report, Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed appellant's medical records and noted her accepted conditions. In response to OWCP's questions, he answered "No" indicating that the proposed total left knee replacement surgery was not medically necessary to treat the accepted October 30, 1999 employment injury. Dr. Hammel explained that the surgery was medically necessary to treat appellant's left knee arthritis, which was not an accepted condition. He further reported that there was no evidence in the record to establish a work-related or consequential left knee osteoarthritis condition.

By decision dated June 13, 2018, OWCP denied authorization for the proposed total left knee replacement surgery. It found that the weight of the medical evidence rested with the April 10, 2018 report of the DMA who determined that the requested surgery was not medically necessary for or causally related to her accepted October 30, 1999 employment injury.

OWCP subsequently received a November 20, 2018 letter by Dr. Paiement who recounted that appellant had been unable to work since January 2018 due to debilitating left knee pain. Dr. Paiement opined that a left total knee replacement surgery was necessary to allow appellant to return to work.

Appellant continued to submit medical reports dated June 14, 2018 through April 18, 2019 from Dr. Herring regarding his treatment of appellant's severe bilateral knee and right hip pain.

On March 13, 2019 appellant, through counsel, requested reconsideration and submitted medical evidence.

Appellant submitted reports dated December 13, 2018 through July 12, 2019 by Dr. James A. Kim, a Board-certified anesthesiology and pain medicine specialist, who recounted appellant's complaints of low back and bilateral knee pain due to a work-related injury. Dr. Kim discussed the medical treatment that appellant had received and noted bilateral knee examination findings of tenderness on palpation and decreased ROM. He diagnosed bilateral knee pain, bilateral knee osteoarthritis, and status post right knee replacement.

On March 20, 2019 OWCP referred appellant, the case file, an amended SOAF, and a series of questions to Dr. Clive Segil, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's employment-related disability and request for total left knee replacement surgery. In a May 23, 2019 report, Dr. Segil described the October 3, 1999 employment injury and indicated that it was very difficult to complete a physical examination of appellant's bilateral knees because she would withdraw the knee due to severe pain. He diagnosed right knee status post multiple knee surgeries and left knee status post multiple knee arthroscopy surgery. Dr. Segil opined that the requested total left knee replacement surgery was appropriate and causally related to the accepted October 30, 1999 employment injury.

A June 19, 2019 bilateral knee x-ray scan report revealed mild-to-moderate left knee degenerative joint disease and unremarkable right knee joint.

In a July 7, 2019 supplemental report, Dr. Segil indicated that, upon review of appellant's recent bilateral knee x-ray scan, his opinion expressed in the previous May 23, 2019 report remained unchanged.

On July 17, 2019 OWCP referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for another second opinion examination and opinion on appellant's need for left total knee replacement surgery, claimed period of disability, and her current work restrictions. In an August 21, 2019 report, Dr. Ha'Eri reviewed the SOAF and the medical records. He noted that appellant's claim was accepted for right knee contusion/strain, right knee contravallation patella, temporary aggravation of the right lower leg osteoarthritis, right knee sprain, right ankle strain, left knee and lower leg contusion, left knee medial meniscus tear, left tibia contusion, and bilateral wrist strain. Upon examination of appellant's knees, Dr. Ha'Eri observed diffused tenderness, left more than right, and limited ROM. Neurological examination of the lower extremities showed no deficit. Dr. Ha'Eri diagnosed right knee status total knee replacement and left knee mild-to-moderate degenerative joint disease. In response to OWCP's questions, he opined that appellant would become a candidate for left total knee arthroplasty in the future. Dr. Ha'Eri explained that appellant's mild-to-moderate left knee degenerative arthritis was temporarily aggravated by the October 30, 1999 employment injury. He noted that the recent left knee diagnostic testing did not show that the degenerative arthritis was bad enough to require total knee arthroplasty. Dr. Ha'Eri completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could work full time with restrictions.

By decision dated September 24, 2019, OWCP denied modification of its prior decision. It found that the weight of the medical opinion rested with Dr. Ha'Eri's August 21, 2019 second opinion report.

LEGAL PRECEDENT

Section 8103(a) of FECA[4] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[5] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in determining whether a particular type of treatment is likely to cure or give relief.[6] The only limitation on OWCP's authority is that of reasonableness.[7]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[8] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[9] In order for a surgical procedure to be authorized, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted.[10] Both of these criteria must be met in order for OWCP to authorize payment.[11]

Abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[12]

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[4] 5 U.S.C. § 8103(a).

[5] *Id.*; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[6] *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

[7] *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

[8] *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

[9] *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[10] *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[11] *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[12] *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's October 30, 1999 traumatic injury claim for right knee sprain, right ankle sprain, left tibia contusion, bilateral wrist contusion, right knee contusion, left knee contusion, right chondromalacia, left knee meniscus tear, and temporary aggravation of right knee osteoarthritis.

Appellant's attending physician, Dr. Paiement indicated that a left knee MRI scan report revealed primary osteoarthritis involving multiple joints and right hip arthritis. He recommended a total knee replacement surgery and further explained that the proposed surgery would allow appellant to return to work.

OWCP undertook development of the claim by referring appellant for a second opinion examination with Dr. Ha'Eri. In an August 21, 2019 report, Dr. Ha'Eri indicated that he had reviewed the SOAF and noted appellant's accepted conditions. He reported bilateral knee physical examination findings of diffused tenderness, left more than right, and limited ROM. Dr. Ha'Eri opined that while appellant could become a candidate for left total knee arthroplasty in the future, the requested left knee surgery was not medically necessary to treat appellant's current left knee injury. He explained that recent left knee diagnostic testing did not show that appellant's left knee degenerative arthritis was bad enough to require total knee arthroplasty.

The Board finds, however, that the August 21, 2019 report of Dr. Ha'Eri, an OWCP second opinion examiner, failed to sufficiently address the underlying issue of whether the proposed total left knee replacement surgery was causally related to the accepted October 30, 1999 employment injury and medically warranted to treat appellant's accepted conditions. The second opinion examiner was specifically instructed to opine as to whether the proposed procedure was causally related to the accepted employment injury, and whether it was medically necessary. However, Dr. Ha'Eri failed to address the primary question posed by OWCP and instead focused on whether the proposed surgery would treat appellant's nonwork-related osteoarthritis.[13] He did not address whether the proposed total left knee replacement surgery was reasonable and necessary to treat appellant's accepted left knee conditions, which include a left knee contusion and left knee meniscus tear. The Board, therefore, finds that the second opinion examiner failed to provide a rationalized opinion explaining whether the proposed total left knee replacement surgery was medically necessary to treat appellant's accepted left knee injury.[14]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[15] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

[13] *See D.T.,* Docket No. 20-0234 (issued January 8, 2021).

[14] *See M.G.,* Docket No. 19-1791 (issued August 13, 2020).

[15] *N.L.,* Docket No. 19-1592 (issued March 12, 2020); *M.T.,* Docket No. 19-0373 (issued August 22, 2019); *B.A.,* Docket No. 17-1360 (issued January 10, 2018).

justice is done.[16] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[17] Because Dr. Ha'Eri, serving as OWCP's second opinion examiner, has not specifically addressed the medical necessity of the proposed total left knee replacement surgery for treatment of appellant's accepted left knee conditions, the case must be remanded to OWCP.

On remand OWCP shall request a supplemental report from Dr. Ha'Eri to obtain a rationalized medical opinion on whether appellant's request for authorization of total left knee replacement surgery is medically necessary due to appellant's accepted October 30, 1999 employment injury. If Dr. Ha'Eri is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[16] *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *see also Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[17] *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 26, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board